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12 *Norman Schwartz; Louis Drapeau; Alice N.*
 Schwartz; Albert J. Hillman; Deborah J. Neff

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

18 | SANFORD S. WADLER, an individual,

19 Plaintiff,

20 || v.

21 BIO-RAD LABORATORIES, INC., a
22 Delaware Corporation; Norman Schwartz;
Louis Drapeau; Alice N. Schwartz; Albert J.
Hillman; Deborah J. Neff

Defendants

Case No. 3:15-CV-2356 JCS

**DEFENDANTS' NOTICE OF MOTION AND
MOTION TO STRIKE REBUTTAL REPORT
OF BRADLEY WENDEL**

Hearing Date: October 14, 2016

Time: 9:30 a.m.

Place: Courtroom G, 15th Floor

Judge: The Honorable Joseph C. Spero

NOTICE OF MOTION AND MOTION

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

3 PLEASE TAKE NOTICE, that on October 14, 2016, or as soon thereafter as the matter
4 may be heard, before the Honorable Joseph C. Spero, Courtroom G, 15th Floor, United States
5 District Court, Northern District of California, 450 Golden Gate Street, San Francisco,
6 California, defendant Bio-Rad Laboratories Inc. (“Bio-Rad”), Norman Schwartz, Louis Drapeau,
7 Alice N. Schwartz, Albert J. Hillman, and Deborah J. Neff will hereby do, move the Court,
8 pursuant to Federal Rules of Civil Procedure 16(b), 26(a)(2)(B), 26(e)(1), and 37(c) to strike the
9 expert report and opinions offered by Mr. Bradley Wendel. This motion is based on the
10 memorandum of points and authorities set forth below, any reply that Defendants may make,
11 such other evidence and argument as may be presented at or prior to the hearing, and all records
12 and files in this action.

INTRODUCTION

14 Federal Rule of Civil Procedure 26 requires that a party disclose any expert opinion it
15 wishes to rely on pursuant to a Court order. This Court set specific deadlines in this case to
16 provide fair and full opportunities for the parties to conduct discovery and prepare for trial.
17 Plaintiff now attempts to evade these deadlines by submitting an untimely expert disclosure
18 disguised as a “rebuttal” expert disclosure. Plaintiff submitted “rebuttal” expert disclosures to
19 the opinions of Defendants’ two experts from two of his three initially designated experts as well
20 as two entirely new experts. The two entirely new experts both purport to rebut the opinions of
21 Defendants’ expert, Dr. E. Emre Carr. In reality, only one does. The other expert, Bradley
22 Wendler expresses opinions in an entirely new area of expertise not addressed by any of
23 Defendants’ expert disclosures—namely, Mr. Wadler’s ethical obligations as an attorney. Mr.
24 Wendel’s opinions are not responsive to Dr. Carr’s disclosed testimony or any expert testimony
25 disclosed by Defendants. If Plaintiff wanted to rely on expert opinion regarding the ethics of Mr.
26 Wadler’s conduct, he was required to disclose those opinions by July 1, 2016 pursuant to the
27 schedule set by this Court under Rule 26(a)(2). Under these circumstances, Rule 37 provides for
28 an automatic sanction for failure to timely disclose expert testimony—the testimony is excluded.

1 Accordingly, Defendants respectfully request that the improper rebuttal report be stricken and
 2 Plaintiff precluded from relying on it at trial.

3 **FACTUAL BACKGROUND**

4 On September 10, 2015, this Court entered its Case Management and Pretrial Order
 5 (“Scheduling Order”) setting applicable deadlines for discovery and expert disclosures. The
 6 Scheduling Order requires “[a]ll expert disclosures required by the Federal Rules of Civil
 7 Procedure [to] be made by July 1, 2016.” Dkt. No. 46.

8 Pursuant to that order, on July 1, 2016, the parties exchanged their initial expert witness
 9 disclosures. Defendants disclosed expert opinions from two experts: Dr. E. Emre Carr and Dr.
 10 David Lewin. Dr. Carr is an expert in, among other things, financial reporting for public
 11 companies, including SEC filing requirements and U.S. GAAP; securities and commodities
 12 trading; and financial statement analysis. Accordingly, Dr. Carr expressed opinions regarding
 13 whether Mr. Wadler’s conduct complied with the standards and laws applicable to a General
 14 Counsel responsible for internal controls and certifying a public company’s financial statements.
 15 Specifically, Dr. Carr expressed his opinion that Mr. Wadler’s insistence that an accrual be
 16 increased after the Company’s earnings release for its 2012 Form 10-K was inconsistent with
 17 U.S. GAAP and an effective system of internal controls. Declaration of Linda Inscoe Ex. A
 18 (Carr Report) ¶¶ 22-26.¹ Dr. Carr also expressed his opinion that the documents Mr. Wadler
 19 relied on did not support his FCPA allegations, but rather indicated the failure of Mr. Wadler to
 20 design and implement an appropriate compliance program. Ex. A (Carr Report) ¶¶ 22-26. Dr.
 21 Lewin, an expert on human resource management and employment relations, submitted a report
 22 on Mr. Wadler’s alleged damages and mitigation efforts. *See* Ex. B (Lewin Report).

23 On July 1, 2016 Plaintiff also disclosed opinions from three purported experts: Mr. Wei
 24 Chui, who disclosed opinions on Mr. Wadler’s economic stock-related losses; Mr. Gordan A.
 25 Kamisar, who disclosed opinions on Mr. Wadler’s prospects for future employment; and Dr.
 26
 27

28 ¹ All references to Exhibits herein shall refer to the Declaration of Linda Inscoe.

1 Margo Rich Oguus who disclosed opinions on Mr. Wadler's economic losses as a result of his
 2 termination.

3 Thereafter, Defendants agreed to Plaintiff's request to extend the 30 day deadline set by
 4 the Federal Rules of Civil Procedure for any rebuttal expert disclosures from July 31, 2016 to
 5 August 17, 2016. Ex. C (Email from M. Priedeman to K. Clune). That extension still permitted
 6 the parties sufficient time to complete any expert depositions by the close of expert discovery on
 7 September 30, 2016.

8 On August 17, 2016, Defendants disclosed rebuttal opinions from both Drs. Carr and
 9 Lewin—the previously disclosed defense experts. Plaintiff disclosed rebuttal opinions from four
 10 experts, including two entirely new experts, both purporting to respond to Dr. Carr. Mr. Donald
 11 A. Walker expressed opinions that Mr. Wadler's conduct was consistent with U.S. GAAP and
 12 did not cause a delay in filing Bio-Rad's 2012 Form 10-K. Mr. Bradley Wendel submitted an
 13 opinion that Mr. Wadler's conduct comported with the code of legal ethics and Sarbanes Oxley
 14 reporting requirements applicable to lawyers. *See* Ex. D (Wendel Report).

15 Prior to submitting this motion, and at their first meeting after receiving Plaintiff's
 16 rebuttal expert disclosures, Defendants asked Plaintiff to withdraw Mr. Wendel's report. Inscoe
 17 Decl. ¶ 9. Defendants explained the need for quick resolution to avoid incurring costs in
 18 preparing for expert discovery related to Mr. Wendel's report. Although Defendants were
 19 prepared to file the motion the following day, Plaintiff's counsel asked Defendants to delay filing
 20 for over a week, to accommodate a planned vacation, and stated that he would demand further
 21 meet and confer if Defendants did not agree to his request with respect to the timing of this
 22 motion. Ex. E (Email from L. Inscoe and M. von Loewenfeldt).

23 ARGUMENT

24 Federal Rule of Civil Procedure 26(a)(2)(D) sets forth the timing and sequence for the
 25 disclosures of expert witnesses. Any expert a party intends to have testify is required to produce
 26 a written report which "shall contain a complete statement of all opinions to be expressed and the
 27 basis and reasons therefor." Fed. R. Civ. P. 26(a)(2)(B). Such a written report must be
 28 submitted in accordance with a court's scheduling order. Fed. R. Civ. P. 26(a)(2)(D).

1 Thereafter, rebuttal disclosures may be introduced either within 30 days after the other party's
 2 disclosure, or on a schedule set by the Court. Fed. R. Civ. Proc. 26(a)(2)(D).

3 Rebuttal disclosures are those that relate to evidence that is "intended solely to contradict
 4 or rebut evidence on the same subject matter identified by another party" in its expert disclosure.
 5 That means, "[t]o constitute proper rebuttal expert disclosure, the expert's opinion must be
 6 designed 'to contradict or rebut' directly an opinion set forth in the opponent's initial expert
 7 disclosure." *Nat'l R.R. Passenger Corp. v. Young's Commercial Transfer, Inc.*, No.
 8 113CV01506DADEPG, 2016 WL 1573262, at *3 (E.D. Cal. Apr. 19, 2016) (citing several
 9 sources). "Rebuttal testimony cannot be used to advance new arguments or new evidence." *Fed.*
 10 *Trade Comm'n v. Amazon.com, Inc.*, No. C14-1038-JCC, 2016 WL 4154284, at *1 (W.D. Wash.
 11 Feb. 9, 2016).

12 Rule 37(c)(1) provides sanctions for failure to comply with Rule 26: a party who fails to
 13 disclose information required by "Rule 26(a) . . . 'is not allowed to use that information ... to
 14 supply evidence on a motion, at a hearing, or at a trial, unless the failure was substantially
 15 justified or is harmless.'" *Hoffman v. Constr. Protective Servs., Inc.*, 541 F.3d 1175, 1179 (9th
 16 Cir. 2008) (quoting Fed. R. Civ. Proc. 37(c)(1)). "Rule 37(c)(1) is a self-executing, automatic
 17 sanction designed to provide a strong inducement for disclosure." *Goodman v. Staples the Office*
 18 *Superstore, LLC*, 644 F.3d 817, 827 (9th Cir. 2011). Applying Rule 37, a district court has the
 19 authority to exclude expert witness testimony for violations of Rule 26 and/or "impose other
 20 appropriate sanctions." Fed. R. Civ. P. 37(c)(1); *see also Payne v. Exxon Corp.*, 121 F.3d 503,
 21 507 (9th Cir. 1997).

22 **A. Mr. Wendel's Testimony Is Not Proper Rebuttal And Was Therefore
 23 Untimely Disclosed**

24 Mr. Wendel's testimony does not respond to, much less contradict any of Dr. Carr's
 25 opinions. Instead, Mr. Wendel offers affirmative opinions regarding whether or not Mr.
 26 Wadler's conduct was ethical. These affirmative opinions were required to be disclosed on July
 27 1, 2016 and since they were not, Mr. Wendel's report must be excluded.

1 A brief review of Dr. Carr's opinions demonstrates that Mr. Wendel does nothing to
 2 contradict them. Dr. Carr's opinions are based on the laws and standards of conduct applicable
 3 to public companies engaged in financial reporting—opinions commensurate with his experience
 4 in regulation of public companies' financial disclosures. Ex. A (Expert Report of Dr. E. Emre
 5 Carr) at ¶¶ 22-26. With respect to Mr. Wadler's involvement in delaying the filing of Bio-Rad's
 6 Form 10-K, Dr Carr opined that Mr. Wadler's insistence that an accrual be increased by millions
 7 of dollars after the Company made its earnings release "did not adhere to Bio-Rad's schedule for
 8 the accounting close process." *Id.* at ¶¶ 22-23. Further, Mr. Wadler's insistence on a certain
 9 amount for the accrual was improper under U.S. GAAP, because it is the "accountants'
 10 responsibility to determine the appropriate accrual." *Id.* at ¶ 23. Dr. Carr explained the severity
 11 of the consequences for a late filing of a Form 10-K and opined that Mr. Wadler contributed to a
 12 significant deficiency in internal control over financial reporting. With respect to Mr. Wadler's
 13 FCPA allegations, Dr. Carr opined that as general counsel of a public company, Mr. Wadler was
 14 responsible for implementing an FCPA compliance program, including ensuring that certain
 15 contracts contained appropriate anti-corruption provisions. That certain contracts did not contain
 16 anti-corruption provisions did not support Mr. Wadler's conclusion that FCPA violations were
 17 occurring in China. In other words, Mr. Wadler did not have support for his allegations that Bio-
 18 Rad violated the FCPA.

19 Mr. Wendel's attempt to frame his opinions as a rebuttal to Dr. Carr is belied by his
 20 disclosure. Mr. Wendel is a professor of law at Cornell Law School who, by his own admission,
 21 specializes in "legal ethics, professional responsibility, and the law governing lawyers." Ex. D
 22 (Wendel Expert Report) at ¶ 2. Mr. Wendel has no experience, much less expertise in financial
 23 reporting, or the standards of conduct applicable to executives responsible for internal controls
 24 over financial reporting. *Id.* at ¶¶ 1-4. Further, the supporting bases of Mr. Wendel's opinions
 25 are wholly different than those underpinning Dr. Carr's opinions. Mr. Wendel relies on the
 26 Model Rules of Professional Conduct and Sarbanes-Oxley regulations applicable to lawyers. Ex.
 27 D at ¶¶ 9-10. Dr. Carr's opinions are based on GAAP and the securities laws. More to the point,
 28 Mr. Wendel does not directly respond to a single one of Dr. Carr's opinions. *See* Ex. A (Carr

1 Expert Report) at ¶¶ 22-26. Mr. Wendel says nothing about the timeliness of Mr. Wadler's
 2 insistence that an accrual be increased, or the consequences of his belated refusal to sign his
 3 representation letter. He says nothing about whether Mr. Wadler implemented or abided by Bio-
 4 Rad's internal controls. And, Mr. Wendel provides no response to Dr. Carr's opinion that Mr.
 5 Wadler was responsible for implementing an adequate FCPA compliance program or whether
 6 Mr. Wadler had adequate support for his FCPA allegations. That Mr. Wendel's opinions
 7 generally address Mr. Wadler's conduct does not make them rebuttal to Dr. Carr's opinions.

8 Tellingly, Plaintiff submitted another expert to actually rebut Dr. Carr's opinions. That
 9 expert has a background in financial reporting and accounting and therefore purports to have the
 10 expertise to rebut Dr. Carr's opinions. Ex. F (Expert Report of Donald A. Walker). Mr.
 11 Walker's opinions directly respond to each of Dr. Carr's opinions, including Dr. Carr's opinion
 12 that Mr. Wadler's communication with respect to the 2012 Form 10-K was untimely, Mr. Wadler
 13 contributed to a significant deficiency in Bio-Rad's internal controls for financial reporting, and
 14 Mr. Wadler made FCPA allegations without adequate support. *See generally, id.* The stark
 15 contrast between that expert's report and Mr. Wendel's disclosures further undermines any
 16 notion that Mr. Wendel's opinions are offered as rebuttal.

17 Plaintiff cannot be permitted to disguise affirmative opinions on a new topic as rebuttal
 18 testimony and deprive Defendants of the opportunity to respond. Because Mr. Wendel's
 19 opinions do not "directly contradict" Dr. Carr's opinions—or any of Defendants' other expert
 20 opinions, Mr. Wendel's opinions do not qualify as rebuttal opinions. Mr. Wendel's opinions,
 21 like other affirmative opinions in this case, were required to be disclosed according to the
 22 Court's Scheduling Order, on July 1, 2016. They were not and they are therefore improper and
 23 untimely.

24 **B. The Untimely Disclosure Of Mr. Wendel's Opinions Is Not Substantially
 25 Justified Or Harmless**

26 As described above, Rule 37 "gives teeth" to Rule 26's disclosure requirements by
 27 forbidding the use at trial of any information that is not properly disclosed. *Yeti by Molly Ltd.*,
 28 259 F.3d at 1106 (citing Fed. R. Civ. P. 37(c)(1)). "The only exceptions to Rule 37(c)(1)'s

1 exclusion sanction apply if the failure to disclose is substantially justified or harmless.”
 2 *Goodman*, 644 F.3d at 827. And the burden is on Plaintiff, as the party facing the sanction, to
 3 demonstrate that the failure to comply with Rule 26(a) was substantially justified or harmless.
 4 *Id.; Torres v. City of Los Angeles*, 548 F.3d 1197, 1213 (9th Cir. 2008); *Yeti by Molly, Ltd.*, 259
 5 F.3d at 1107.

6 Plaintiff’s attempt to sneak in affirmative evidence under the guise of a rebuttal report is
 7 neither substantially justified nor harmless. It is no secret that Mr. Wadler’s FCPA allegations
 8 and conduct prior to his termination are issues central to this litigation. Plaintiff is well aware
 9 that Bio-Rad’s defense is, and has always been, that Mr. Wadler’s FCPA allegations were
 10 unfounded and part of a disruptive pattern of conduct that formed the basis for his termination.
 11 See Dkt. 44 at 3-5 (Initial Case Management Statement outlining Defendants’ position). Further,
 12 as spelled out to Plaintiff as early as August 2015, Bio-Rad’s defense is based on Mr. Wadler’s
 13 conduct—including his refusal to share necessary information in a timely way, such as his
 14 belated assertion that an accrual was too low. Dkt. 44 at 5. If Plaintiff had wanted to offer an
 15 opinion about whether Mr. Wadler’s conduct comported with the code of ethics or the Sarbanes-
 16 Oxley reporting requirements, that report needed to be disclosed with the initial expert
 17 disclosures on July 1, 2016.

18 The harm to Defendants in receiving an untimely expert disclosure with less than 6 weeks
 19 to the close of expert discovery and less than five months until trial is clear. Defendants have no
 20 opportunity to submit expert testimony rebutting Mr. Wendel’s conclusory assertions that Mr.
 21 Wadler followed the law. Further, in addition to preparing for depositions of Plaintiff’s properly
 22 disclosed experts, Defendants must now prepare to depose an additional expert, on a new topic in
 23 half the time.² In the midst of trial preparation, this additional burden is more than enough to
 24 warrant exclusion of Mr. Wendel’s testimony. See *Wong v. Regents of the Univ. of Cal.*, 410
 25 F.3d 1052, 1062 (9th Cir. 2005) (excluding untimely disclosed witness “even though the ultimate

27 2 The further delay, requested by Plaintiff’s counsel, serves only to exacerbate the difficulties
 28 posed by an improper rebuttal report by delaying the Court’s consideration and decision on this
 issue. Inscoe Decl. C; Ex. E.

trial date was still some months away,” noting that “[d]isruption to the schedule of the court and the other parties . . . is not harmless”).

In the event the Court chooses not to strike Mr. Wendel’s report in full, Defendants request that the Court provide them with an opportunity to submit a rebuttal to Mr. Wendel’s affirmative opinions. *Svoka v. Woodle*, No. C-02-5524 SI, 2004 WL 5512964 (N.D. Cal. June 7, 2004) (permitting defendant opportunity to submit a rebuttal to untimely disclosed expert report). Specifically, Defendants request 45 days to submit rebuttal disclosures—the same amount of time they would have had if Mr. Wendel’s opinions had been timely disclosed—and the opportunity to depose Mr. Wendel within 30 days after such submission. Finally, Defendants request the attorneys’ fees and costs expended in pursuing sanctions under Rule 37 for an improper rebuttal report.

CONCLUSION

13 For the foregoing reasons, Defendants respectfully request that the Court strike the
14 rebuttal disclosure from Mr. Wendel, and order that Plaintiff not be permitted to use Mr.
15 Wendel's opinion as evidence at a trial or hearing, and any other sanctions the Court deems
16 appropriate.

17 | Dated: September 2, 2016

Respectfully Submitted,

LATHAM & WATKINS LLP

By /s/

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